No. 2011.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY F. RAINEY, as Administratrix of the Estate of DAVID L. RAINEY, deceased,
Appellant,
vs.
W. R. GRACE & COMPANY, a corporation,
Appellee

No. 2011

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT

WILLIAM H. GORHAM,
Proctor for Appellant.

653 Colman Building,
Seattle, Washington.

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(Errata: Substitute the word "survive" for the word "create" in line 5, page 15; substitute the word "survives" for the word "created" in line 1, page 37, Appellant's Supplemental Brief.)

I.

The contention of appellee is:

That appellant in urging that the second

amended libel states a cause of action sounding on contract, is now setting up a *new* cause of action; and advances as argument against appellant being permitted to do so:

First, that on account of witnesses being no longer available it would not be doing justice, but denying it.

Second, that any application now to amend comes too late.

To this appellant replies: That she is not asking leave to add to, withdraw or in any way modify or change any allegation of the libel; on the contrary, she relies on those allegations. She alleges that those allegations state a cause of action on contract and asks the court to consider the substance and not the form, of the libel, so far as that form is expressed in the *preliminary* recital that it is a cause of tort, in accordance with the liberal practice obtaining in admiralty.

Appellee's exceptions to the libel are to the effect: that it does not set forth facts sufficient to constitute *a cause of action* against appellee.

As to the witnesses not now being available, whatever witnesses were once available appellee, it

had opportunity to put the machinery of the law in motion to avail itself of their testimony, either in this cause or in the manner provided for perpetuating testimony.

Furthermore, while there is nothing in the record to show whether or not testimony has been taken in this cause, in view of appellee's contention that witnesses are not now available, we think the fact can be disclosed without violating any propriety, that the testimony of the members of the crew who witnessed the accident alleged in the libel was taken in this cause upon proper notice to appellee long prior to the disposition of the cause in the lower court.

Even if changing the recital of the libel as to the nature of the action from "tort" to "contract" is to be considered an "amendment," such amendment is not too late, as shown by the authority cited by appellant's supplemental brief, pages 16-17. The authorities cited in appellee's brief, page 12, to the contrary, we submit, are not applicable to the admiralty practice.

II.

(a)

Appellee contends: That in the case at bar it was its duty to appellant's intestate to use due and reasonable diligence in providing safe and sound instrumentalities with which to perform his work, but contends that that duty arises out of the common law relation of master and servant.

Appellee concedes that the vessel and her owner are by both English and American law liable for injuries to seamen in consequence of unseaworthiness of the ship; concedes that the English law provides: In every contract of service between owner of a ship and seamen there shall be implied an obligation on the owner to use all reasonable means to insure seaworthiness; but contends that such duty is imposed by law and for a breach thereof an action *ex delicto* is maintainable.

Appellee's contention that the municipal law must govern relations between appellee and appellant, would abrogate the maritime law.

The fault in appellee's argument is, it fails to distinguish between those relations of master and servant where the master's duty is imposed by law

and cannot be "contracted out," and those relations between owner of a ship and the seamen where the recognized exigencies of water-borne commerce permit such "contracting out,"—for such freedom of contract is permitted under the British Merchant Shipping Act and under the general maritime law of the United States.

And therein lies the crux of the whole matter.

"If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded on contract and not upon tort. If on the other hand the relation of plaintiff and defendant be such that a duty arises from the relation irrespective of contract to take due care and defendants are negligent, then the action is one of tort."

Kelly vs. Met. R. Co., I Q-B 944.

Cited in Ry. Co. vs. Laird, 164 U. S. 393.

II.

(b)

Appellee contends that even if appellant's intestate could have brought an action *ex contractu* to recover damages, the case at bar is not such an action, for appellant's intestate's action for injury

died with him and appellant's action is

"A totally new cause of action;" "new in its species;" "new in its quality;" "new in its principle;" "in every way new;"

Citing many authorities construing Lord Campbell's Act and other statutes, including Federal Railway Employees' Liability Act (before amendment) *creating* a right of action where death ensued and citing *Crowley vs. Ry. Co.,* 30 Barbour 99, to the effect:

"If the cause of action set out in the complaint, therefore, could be considered as arising upon this contract, and surviving, by force of the statute, in behalf of the plaintiff as the representative of the deceased, then most certainly the action could be maintained."

That is the case at bar not only as to the *contract,* but as to the *survival.*

The statute of the State of Washington, upon which this action is based (Sec. 4838, Ball. Code) expressly provides that no action for personal injury occasioning death shall abate nor any such right of action determine by reason of death, but such action may be commenced and prosecuted in favor of the wife, etc.

Robinson vs. Reduction Co., 26 Wash. 484.

Mesher vs. Osborne, 33 Wash. Dec. 300.

Electric Company vs. Hartless, 144 Fed. 379, C. C. A., 9th Cir.

III.

Appellee contends that the fact that the shipping articles were British form for service on a ship of British registry, flying the British flag, determines the law to be applied in this case, to-wit, the British law.

Where the owner *pro hac vice* is an American corporation and the seaman an American citizen, the law of the place of contract will govern, notwithstanding the service is on a ship of British registry flying the British flag.

Residence of owner not place of registry control as to law applicable.

The *Alice Tainter,* Fed Cas. 194-195, in which an American built vessel really owned by residents in New York, but put under the British flag, formally transferred to a British subject and registered in a British port, held: So far as revenue laws of the United States were concerned she was no longer an American vessel, but that she was not subject as a foreign vessel to a maritime lien for supplies, furnished in New York at the request of her real owners.

In *Chisholm vs. J. L. Pendergast,* 32 Fed. 415, Circuit Court, Southern District, New York, opinion by Judge Wallace, in which an American citizen, libellant, contracted with Pendergast, also an American citizen, the real owner of the ship, to act as its master, the vessel being a foreign built bottom, registered in the name of a British subject, and carrying the British flag, Held: Libellant dealt with Pendergast as owner and as between the parties the bark was an American vessel and libellant had no lien for services as master under the admiralty law of this country.

Chartered Merc. Bank, etc., vs. Netherlands, etc., Navigation Co., 5 Asp. Mar. Cases. 65.

Respectfully submitted,

WILLIAM H. GORHAM,

Proctor for Appellant.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY F. RAINEY, as Administratrix of the Estate of David L. Rainey, deceased,
Libelant and Appellant,
vs.
W. R. GRACE & COMPANY, a corporation,
Respondent and Appellee.

No. 2011

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

APPELLEE'S REPLY TO SUPPLEMENTAL BRIEF OF APPELLANT

STATEMENT.

The *second* amended libel alleges that on or about September 1, *1907*, the libelant's intestate, David L. Rainey, signed shipping articles, British form, to serve as chief engineer of the British steamship "Cacique," whose registered owner was the New York & Pacific Steamship Company, Ltd., a corporation of Great Britain, on a voyage then about to be commenced from a port on Puget Sound to

a port or ports in Peru and return to the Pacific Coast of the United States of America. It may be here said that the shipping articles were signed before the British Vice Consul at Seattle, Washington. The second amended libel does not so state, but such an averment was contained in the two preceding libels, and it is agreed between the proctors for the respective parties that the second amended libel may be considered as containing such an allegation.

The second amended libel further alleges that on the 30th day of January, *1908*, David L. Rainey, while on board the "Cacique" (the "Cacique" at that time being in the port of Mollendo, Peru), was burned by reason of the alleged unseaworthiness of the vessel, and, as a result of the injuries so received, died on February 25, *1908,* in the hospital at Mollendo.

The second amended libel further avers that the libelant, Mary F. Rainey, is the administratrix of the estate of David L. Rainey and is the widow and sole heir of David L. Rainey; that David L. Rainey was her sole means of support; and that this action was brought for her sole benefit.

The respondent excepted to the libel on the grounds set forth on page 7 of appellant's brief.

ARGUMENT.

I.

When this cause was argued in the court below, libelant's right to recover was based upon the theory

that this was a tort action, and, as such, governed by the *lex loci delicti.* The libelant then contended, as she did in her original brief filed in this Court, that the *locus delicti* was Connecticut, for the reason that W. R. Grace & Co. was incorporated in that State. Annexed to libelant's brief in the court below was an exhaustive synopsis of the legislation of Connecticut relative to actions for death by wrongful act. It is now admitted that libelant's synopsis was incorrect in that it omitted the only relevant act of that State. The act omitted was passed on June 18, 1903 (page *149* of the Acts of 1903), and repeals Section 1094 and Section 1119 of the Connecticut Code, as amended by Chapter *149* of the Public Acts of 1903. The act of June 18, 1903, is therefore the only statute of Connecticut which now grants a cause of action for death arising from wrongful act, and by Section 4 of the act it is provided that all suits brought by virtue thereof must be commenced within one year from the neglect complained of and that no amount in excess of $5,000 can be recovered.

At the time of the argument in the court below, as well as in the preparation of the initial brief of respondent herein, we relied upon the case of *Radezky v. Sargent,* 58 Atl. 709, which cites the act of June 18, 1903, and holds that the time within which actions for death by wrongful act must be brought is not a limitation of the remedy alone, but is a limitation of the liability itself; in other words, that the bringing of a suit within the time prescribed is a condition precedent to the right to sue at all.

While it is true that the proctor for libelant overlooked the citation of the act of June 18, 1903, in the Radczky case and did not know of the existence of that act at the time of the service of his brief in this Court, yet it will not be denied by him that he did know of the existence of this act shortly prior to September 13, 1911, the date this case was originally set for argument before this Court. The Court will remember that the reason assigned at that time for not arguing and finally submitting this case was that a controversy had arisen between the libelant and the Clerk of this Court as to the amount of costs to be paid by libelant for filing the record.

Now, we concede that a court of admirality is not bound by the technical rules of pleading and forms of procedure prevailing in actions at common law. The 23rd admiralty rule, however, provides as follows:

> "All libels in instance causes, civil or maritime, shall state the *nature* of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of *tort* or damage, or of salvage, or of possession, or otherwise, as the case may be." (Italics ours.)

The second amended libel in this cause avers that this action is "a case of *tort,* civil and maritime." All the libels filed in this cause have made such an averment, and the reason advanced by libelant's proctor in his initial brief to sustain the sufficiency of the libel proceeded upon the theory that this was a tort action. If it was such, there never has been

any serious question but that libelant could not recover. The truth of this statement will be apparent from the fact that in our original brief we did not endeavor even to determine by what law this case was governed; we made it manifest that whether this action was governed by the law of Connecticut, Great Britain or Peru, the same result necessarily followed. If anything more is needed to demonstrate the correctness of our position, the supplemental brief of libelant furnishes the required proof.

No reason existed, therefore, why respondent should make any effort to keep track of the witnesses to the accident complained of. Over six years have elapsed since the date of Rainey's death, though no part of this delay is attributable to respondent. This Court knows that sailors are here today, and gone tomorrow; that by this time the seamen on the "Cacique," if alive, are dispersed to the four quarters of the earth. Recognizing that defendants in actions of this kind might be subjected to great injustice through the loss of witnesses, if actions of this character were not promptly brought, Lord Campbell's Act and the vast majority of American statutes, modeled thereon, limit the time in which an action based upon such statutes may be brought to one year. Particularly in view of the wanderings of sailors, every reason exists why a case of this kind should be promptly brought. This action, however, was not commenced until twenty months after Rainey's

death, and it is fair to say that if this suit had been commenced within one year the present contention would never have been made. No reason nor excuse has ever been offered why this suit was not brought within one year. To permit, therefore, the setting up of practically a new cause of action after the lapse of over six years, and when witnesses are no longer available, is not to do justice, but to deny it.

Libelant, however, contends that she may now set up a new cause of action, and in support of her contention cites the case of *California-Atlantic S. S. Co. v. Central Door & Lumber Co.,* 206 Fed. 5. That case is not in point for two reasons.

The question for determination there was whether facts were alleged which showed affirmatively that the court had *jurisdiction* in *admiralty.* The court's *jurisdiction* as an admiralty court is not involved in the case at bar. The question for determination here is the *nature* of the cause.

The Act of August 23, 1842 (Rev. Stat. § 917); provides that "the Supreme Court shall have power to prescribe from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the Court, and generally to regulate the whole practice to be used

in suits in equity or admiralty of the Circuit and District Courts." In pursuance of this act the 23rd admiralty rule was promulgated. No rule of court, however, can alter or enlarge the jurisdiction of the courts of the United States.

> *The St. Lawrence,* 1 Black, 522.
> *In re Kirkland,* Fed. Cas. No. 7842.

> "But there is a wide difference between the power of the court upon a question of *jurisdiction* and its authority over its *mode* of *proceeding* and process." (Italics ours.)
>
> *The St. Lawrence,* 1 Black, 522, 527.

The rules promulgated by the United States Supreme Court do not relate to the question of jurisdiction (*The St. Lawrence, supra; In re Kirkland, supra*); they do relate to questions of practice and procedure, and "the practice and proceedings" of admiralty courts "are regulated by rules prescribed by the Supreme Court of the United States." (*Bruce v. Murray,* 123 Fed. 366, C. C. 9th Circuit.)

The proctor for libelant has, therefore, utterly misconceived the doctrine enunciated in the California-Atlantic S. S. Co. case. To adopt his construction of the language therein used would be to make Rule 23 of no effect, though that rule, as said by this Court, *regulates* the practice and proceedings in admiralty cases.

The above mentioned case is not in point for another reason. This Court, having determined that

the court below had no jurisdiction of the cause as a case in admiralty, remanded the cause with leave to the appellee so to amend its libel, if possible, as to show that the court did have jurisdiction in admiralty. The contract in that case was made in December, 1910, and the case was decided by this Court in May, 1913, only two and one-half years thereafter. Any action upon the contract there involved would consequently not have been barred if suit had not been commenced until after May, 1913. But in the case at bar a new cause of action is set up after the statute of limitations has run. That it is a new cause of action, there can be no doubt. The case attempted to be made by the supplemental brief is based upon an alleged breach of an implied warranty of seaworthiness. There is no mention, however, made in the second amended libel of any such warranty. On the contrary, that libel, after setting forth the citizenship and residence of Rainey and his wife, the death of Rainey, the appointment of Mrs. Rainey as administratrix of the estate of Rainey, the incorporation of the New York & Pacific Steamship Company, the incorporation of W. R. Grace & Company, the terms of the charter party by which the "Cacique" was chartered to Grace & Company, the license of Rainey, the signing of shipping articles, British form, by Rainey, the voyage contemplated by the shipping articles, the rate of compensation to be paid to Rainey, the age and expectancy of Mrs. Rainey, the age and expectancy of Rainey, avers that the "Cacique" was an oil

burner using oil as fuel for the purpose of generating the steam used in operating an electric dynamo illuminating the ship; that the feed pump on said steamship used for supplying oil as fuel for the purpose aforesaid was liable to become clogged with oil and fail to supply sufficient or any oil for fuel purposes and would require to be put in working order again before the work of the vessel could go on, which was or should have been known to respondent; that the steamship was not furnished or supplied with safety lamps from which the volatile fumes of the fuel oil would be protected and ignition therewith thereby prevented when the dynamo was out of commission and other means of illuminating had to be resorted to to enable the crew to do the work necessary aboard the vessel; that on the 30th day of January the feed pump became clogged with oil and in consequence the dynamo was put out of commission; that it then became necessary and the duty of Rainey to put the feed pump in working order in order that the dynamo might be kept running to the end that the work of the vessel might proceed; that in the prosecution of the duty of putting the feed pump in working order, Rainey was obliged to use a Dietz lamp; that the volatile fumes of the oil arising from the fuel oil in the feed pump became ignited by the flame of said lamp, thereby occasioning an explosion of the gas and the fuel oil in the feed pump; that Rainey was subjected to the flames of burning oil and was burned about the head and body, from the effects of which he died

on February 25, 1908, in the hospital at Mollendo, Peru; "all of which was through no fault, negligence or want of care on the part of said David L. Rainey * * * but solely through the failure of said respondent to keep and maintain said steamship in a seaworthy condition as aforesaid."

Continuing, the second amended libel avers:

> "That the *laws* of the United States *in force* at all of said times between the 1st day of August, 1907, and the 30th day of January, 1908, provided, *inter alia,* that in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof there is implied, notwithstanding any agreement to the contrary, an *obligation* on the owner of the ship that the owner of the ship shall provide a seaworthy ship for the voyage at the time of the commencement of the voyage and shall keep said ship in a seaworthy condition for the voyage during the voyage;" (Article XVI).

The libel also sets forth a portion of Section 458 of the Merchants' Shipping Act of Great Britain, and alleges that by reason of the foregoing facts the libelant has been damaged in the sum of $25,000, and that the action was brought for the benefit of Mary F. Rainey.

It will thus be observed that the libel alleges that there is a statute of the United States which imposes upon shipowners the *obligation* or duty to provide a seaworthy vessel. We say that the libel

alleges that there is such a statute, for the phrase "the *laws* of the United States in *force*" can mean nothing else. Counsel now says that there is no such statute (Supp. Brief, p. 26), but the non-existence of such a statute is immaterial in determining whether the second amended libel states a cause of action for tort or on contract. The second amended libel does aver that there is such a statute. According to libelant's own theory, if there is such a statute, this is an action for tort. The averment therefore of such a statute made this an action for tort.

Escape from this theory is also sought by the statement that "there is no allegation in the libel that the respondent knew of the unseaworthy state of the Cacique alleged, only an allegation that that state existed from the commencement of the voyage. There is no affirmative allegation of negligence on the part of the respondent." (Supplemental Brief, p. 27.) Assuming that there is no averment of an affirmative act of negligence in the libel, yet the lack of such averment does not change the nature of the cause of action. "A tort," says Mr. Pollock, is "an act or *omission* causing harm which the person so acting or *omitting* did not intend to cause, but might or *should with due diligence* have *foreseen and prevented.*" (Pollock on Torts, 1, 19.)

It will be noted that the libel avers "that the feed pump on said steamship, used for supplying oil as fuel for the purposes aforesaid, was liable to become clogged with oil, fail to supply sufficient or

any oil for fuel purposes, and would require to be put in working order again before the work of the vessel could go on, which *was* or *should have been known* to respondent." All that this allegation means, all it can mean, is that respondent "should, with due diligence, have foreseen and prevented" the injury to Rainey.

The second amended libel, then, avers facts which show that there was a duty imposed by positive law upon the respondent, a failure or omission to perform that duty by respondent, which omission resulted in the death of libelant's intestate, and that by reason of the death of libelant's intestate the libelant has suffered pecuniary damage. There is, as we have said, no allegation of an implied warranty nor of breach of such warranty, both of which would be necessary allegations in an action for breach of contract (*Atlantic & Pac. Ry. Co. v. Laird,* 164 U. S. 393, 398.) Clearly, therefore, the statement in the libel itself that the case was one of tort, civil and maritime, accurately describes the nature of the cause.

If, therefore, it is now sought to amend the libel by alleging a cause of action on contract, the amendment comes too late.

Union Pac. Ry. Co. v. Wyler, 158 U. S. 285.
Boston & M. R. R. v. Hurd, 108 Fed. 116.
Despeaux v. Penn. R. R. Co., 133 Fed. 1009.
Carmichael v. Argard, 9 N. W. 470.
Klipstein v. Raschein, 94 N. W. 63.
Box v. Chicago, R. I. & P. Ry. Co., 107 Iowa 660, 78 N. W. 694.

Chicago & Alton R. Co. v. Scanlan, 48 N. E. 826.
Georgia Railroad & Banking Co. v. Roughton, 34 S. E. 1026.
Peterson v. Pennsylvania R. Co., 46 Atl. 112 (1900).
Skidaway Shell Road Co. v. O'Brien, 73 Ga. 655.
Moyer v. Ramsay-Brisbane Stone Co., 119 Ga. 734, 46 S. E. 844 (1904).

II.

Not A Contract Action.

(a) Conceding, for the sake of argument, that libelant may now contend that this is an action for breach of contract, nevertheless there can be no recovery, for this is not a contract action at all.

The argument for libelant, as we understand it, may be put in the following form, though, as will be seen, it is impossible to reduce it to a syllogism:

There was no positive statute law requiring respondent to provide Rainey at the commencement of the voyage with a seaworthy vessel; therefore, there was no obligation or duty on the part of respondent to exercise reasonable care to provide him with a seaworthy ship.

There was implied in the contract of employment between Rainey and respondent a *warranty* that the "Cacique" was seaworthy at the commencement of the voyage and that such condition of the vessel would be maintained throughout the voyage.

Therefore, there was no duty on the part of the respondent, apart from the warranty implied in the contract, to provide Rainey with a seaworthy vessel,

and, under the rule laid down in *Kelly v. Met. R. Co.* (1895), 1 Q. B. 944, this must be an action for breach of contract.

Now, the fallacy of this reasoning lies in the assumption, first, that because no statute provides that the shipowner must in all circumstances provide a seaman with a seaworthy ship, there is no duty on the part of the shipowner to use reasonable care to provide such a ship; second, that a warranty of seaworthiness is implied in the contract of service. We think, however, there is a duty on the part of the shipowner to use all reasonable means to provide the seaman with a seaworthy ship, both at the commencement of the voyage and during the voyage. Is not this duty exactly the same in principle as the duty of a master at common law to provide his employe with a safe place to work and proper appliances or instrumentalities with which to work? This obligation of any master is as much an obligation implied from the contract of service as is the obligation now under consideration.

> "It is well-settled," says Mr. Labatt, "that the duties of a master to his servants arise out of the contract of employment, and are limited to those obligations which, under that contract, he has impliedly agreed to perform. Stated in their most general form, these duties are: (1) To see that suitable instrumentalities are provided; (2) to see that those instrumentalities are safely used."
>
> *Labatt on Master & Servant* (2d Ed.), § 898.

Continuing, Mr. Labatt states that the word "instrumentalities" includes machinery, apparatus, premises and servants.

Now, while this duty is generally expressed by saying that the master is *bound to provide* his employe a safe place in which to work and safe instrumentalities with which to work, yet this statement does not mean and was never held to mean that the master is an *insurer* of the servant's safety. All that can be required of the master is that he shall use due and reasonable diligence in providing safe and sound instrumentalities.

> "So far as there is any guaranty on his part, it is merely that due care shall be exercised in furnishing and maintaining the instrumentalities."
>
> *Labatt on Master & Servant* (2d Ed.), § 919.

> "There is no warranty that machinery shall be so complete that no injury shall be incurred by the servant."
>
> *Weems v. Mathieson* (1861), 4 Macq. H. L. Cas. 215.

> "A master does not warrant the soundness of the materials furnished by him."
>
> *Ormond v. Holland* (1858), El. Bl. & El. 102.

> "Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employes. Nor

> are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, *bound to use all reasonable care and prudence* for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employe or servant." (Italics ours.)
>
> *Washington & Georgetown Railroad v. McDade,* 135 U. S. 554, 570.
>
> *Patton v. Texas and Pac. Ry. Co.,* 179 U. S. 658, 664.

Failure to use due care, "all reasonable care and prudence," is therefore a breach of the implied obligation of the contract of hiring, but it has never been held that such breach gave rise to an action *ex contractu.*

> "The duty owed the servant, for example, in respect to the condition of premises and machinery, has been supposed to exist by virtue of contract. But duty, if derived from contract at all, is only implied in it; and, if new terms are to be inserted into the agreement, every duty which the master owes might be treated as con-

> tractual, and thus the servant might sue the master in contract for assault and battery. The universal trend of authority on analogous cases is to regard such duty as not contractual, but as of the general law."
>
> *Jaggard on Torts,* Vol. II, § 259, p. 899.

The duty of a shipowner, we think, is, in this regard, the same as that of any other master. While the general maritime law governs the case at bar, yet "it must be borne in mind that the maritime law is not in itself a complete and perfect system."

> "In all maritime courts," said Judge Brown in *The City of Norwalk,* 55 Fed. 98, 107, "there is a considerable body of municipal law that underlies the maritime as the basis of its administration. Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns, maritime transactions. The general body of the law as regards the ordinary fundamental rights of persons and property, whether on land or sea, is, as observed by Mr. Justice Field in the passage above quoted, derived from the constituted order of the state, i. e., from the municipal law, which courts of admiralty to a considerable extent must necessarily adopt and follow, subject only to the modifications which the special characteristics of the law of the sea impose on maritime subjects."

That the case at bar does not fall within the qualification expressed in the last clause of the foregoing quotation is manifest from the following cases.

In *Halverson v. Nisen,* 3 Sawyer 562, an action was brought to recover compensation for injuries sustained by a seaman by reason of the giving away of a rope to which a triangle on which the seaman was working was attached. The Court said:

> "If, by the owner's negligence, the rigging or apparel are defective, and the seaman sustains an injury in consequence, the owner would be liable. His liability in this respect does not differ from that of any other master to a servant in his employment. It is the master's duty in all cases to use *ordinary care and diligence* to provide sound and safe materials for his servants. But he does not *warrant* them to be so nor *insure* the servant against the consequences of their defects." (Italics ours.)

The following cases either enunciate a like doctrine or impliedly assume the correctness of such doctrine.

Grimsley v. Hankins, 46 Fed. 400.
The Lowlands, 142 Fed. 888.
The Henry B. Fiske, 141 Fed. 188, 190.
The France, 59 Fed. 479.
The P. P. Miller, 180 Fed. 288, 290.
Brown v. The D. S. Cage, 1 Woods 401, 403.
The Argo, 210 Fed. 872.
The Lizzie Frank, 31 Fed. 477.
The Edith Godden, 23 Fed. 43.

These cases, therefore, demonstrate that even though there be no statute imposing an absolute duty upon the owner to provide a seaworthy vessel, yet there is a duty imposed by law upon owners to

use reasonable care to furnish sailors with a seaworthy ship, and for breach of such duty the seaman must maintain an action *ex delicto.* Appellant, however, seeks to meet this argument by asserting that in every contract of service between shipowner and seaman there is an implied warranty on the part of the shipowner that the vessel shall be seaworthy at the commencement of the voyage and shall be so kept during the voyage, and it is insisted that *The Osceola,* 189 U. S. 158, is an authority for this proposition. Such, however, is not the holding of the Osceola case, and there is ample authority that no warranty of this character is implied in the contract of service.

In *Grimsley v. Hankins,* 46 Fed. 400, Judge Toulmin said:

> "The defendant did not *covenant* to furnish machinery and appliances that were safe beyond a contingency, nor did he *warrant* the competency of fellow-servants. But he was required to use due care and reasonable diligence for the protection of his employes." (Italics ours.)

In *The Henry B. Fiske,* 141 Fed. 188, 190, it is said:

> "As regards the crew employed on board a vessel, there is no *warranty* on her part that none of her fittings or appliances shall at any time give way, to their injury. Liability on her part, in the case of an accident of this kind, is incurred only when those who represent her

have *failed to exercise reasonable care* to make the fitting or appliance safe, and arises only out of such defects as reasonable care on their part would have discovered and remedied." (Italics ours.)

"An employer," said Judge Wallace in *The France,* 59 Fed. 479, "does not undertake *absolutely* with his employes for the sufficiency or safety of the appliances furnished for their work. He does undertake to use all *reasonable care and prudence* to provide them with appliances reasonably safe and suitable. His obligation towards them is satisfied by the exercise of a reasonable diligence in this behalf." (Italics ours.)

In *The Lizzie Frank,* 31 Fed. 477, a case in which a seaman was injured by the failure of the shipowner to provide a sufficient chock, it is said:

"According to the English law, there is no implied warranty of seaworthiness in a contract between an owner of a ship and a seaman to serve on board of her. But it is said that this is repugnant to the American law. On consulting the American authorities, we find it stated that the owner, among other obligations to the seaman, is bound to provide a seaworthy ship, and that this means that at the commencement of a voyage the ship shall be furnished with all necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy. Seaworthiness includes a

> competent crew. Yet the owner does not *warrant* to each seaman the competency of the others. *The E. B. Ward,* 20 Fed. Rep. 704; *Dixon v. The Cyrus,* 2 Pet. Adm. 411." (Italics, the Court's.)

Now not only do these cases establish the proposition that there is no implied warranty of seaworthiness in a seaman's contract, but The Osceola, instead of denying the correctness of this proposition, supports it. A reading of that case will demonstrate that the Supreme Court of the United States deems that the law of this country with reference to the furnishing of a seaworthy vessel to the crew is the same as the law in England. On page 173 it is said of the holding in The Edith Godden case that it is in line "with *English* and American authorities holding owners to be responsible to the seaman for the unseaworthiness of the ship and her appliances." On page 175, Mr. Justice Brown remarks:

> "That the vessel and her owner are, both by *English* and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." (Italics ours.)

And again:

> "It will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the ex-

pense of maintenance and cure in cases arising from unseaworthiness. This departure originated in *England* in the Merchants' Shipping Act of 1876, above quoted, *Couch v. Steel,* 3 El. & Bl. 402; *Hedley v. Pinkney &c. Co.,* 7 Asp. M. L. C. 135; 1894 App. Cas. 222, *and in this country, in a general consensus of opinion among the Circuit and District Courts,* that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel." (Italics ours.)

What, therefore, does the English law provide? Section 458 of the Merchants' Shipping Act is as follows:

"(1.) In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an *obligation* on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing of the ship for sea, or the sending of the ship to sea, shall *use all reasonable means* to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage.

(2.) Nothing in this section—

(a.) shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the sending of the ship to sea in such a state was reasonable and justifiable; or

(b.) shall apply to any ship employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession." (Italics ours.)

It is argued by proctor for libelant that this statute implies a warranty of seaworthiness of the ship at the commencement of the voyage in every contract of employment. Clearly, however, no such warranty is implied. By the statute, an *obligation* or *legal duty* (for they are synonymous terms—Bouvier, Vol. 2, p. 533; 15 How. Prac., 48, 55), to use *all reasonable means* to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep her in a seaworthy condition for the voyage is imposed upon the shipowner, except in those instances when, owing to special circumstances, the sending of the ship to sea in an unseaworthy condition is reasonable and justifiable; or when the ship is employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession. The duty, therefore, to use all reasonable means to provide a seaworthy ship, except in

the instances specified, is exactly the same as the duty of any other master, viz., to use all reasonable means to provide his servants a safe place in which to work and safe instrumentalities with which to work.

Furthermore, the cases cited in The Osceola as evidencing "the general consensus of opinion among the Circuit and District Courts" show conclusively that our construction of The Osceola case is correct.

For instance, in *The Edith Godden,* 23 Fed. 43, the first case cited by Justice Brown relevant to this proposition, it appears that the seaman was injured in part by reason of a defect in a hook forming a part of the derrick appliance, and partly by reason of the fact that the brake attached to the winch could not be used because it was out of order. Judge Brown said:

> "I cannot doubt that the real cause of this accident was in the overweight, or strain incident to the use of this derrick and winch, in lowering so heavy a weight in a rolling sea. It is not a case of any latent defect; for the testimony of the experts negatives any such cause. Nor is there proof of any definite act of negligence on the part of the men that were using or handling the winch or the derrick. *The machinery must therefore be deemed itself insufficient for the use to which it was applied, under the particular circumstances where it was thus used.* Upon the evidence it must be inferred, moreover, that the owners were responsible for

the use of this machinery under the circumstances that caused it to break and injure the libelant. * * * *Their legal duty by the municipal law,* was to *exercise due care* in providing machinery adequate and proper for the use to which it was to be applied, and to maintain it in like condition. *Kain v. Smith,* 80 N. Y. 458, 467; *Devlin v. Smith,* 89 N. Y. 470; *The Rheola,* 19 Fed. Rep. 926." (Italics ours.)

In *The Rheola,* 19 Fed. 926 (cited by Judge Brown in *The Edith Godden*) Judge Wallace said:

"The libelant was performing a service in which the shipowners had an interest, and which they contemplated would be performed by the use of appliances which they had agreed to provide. They were under the same obligation to him not to expose him to unnecessary danger that they were under to the master stevedore, his employer. There was *no express contract obligation,* on their part, to either, to provide safe and suitable appliances; but they were *under an implied duty* to each; and the measure of the duty towards each was the same. What would be negligence towards one would be towards the other. (*Coughtry v. Globe Co.,* 56 N. Y. 124; *Mulchey v. Methodist Society,* 125 Mass. 487.)

"The implied obligation on the part of one who is to provide machinery or means by which a given service is to be performed by another, is to use proper care and diligence to see that

such instrumentalities are safe and suitable for the purpose. 'It is the duty of an employer inviting employees to use his structures and machinery, to use proper care and diligence to make such structures and machinery fit for use.' (*Wharton on Negligence,* § 211.) If he knows, or, by the use of due care, might have known, that they were insufficient, he fails in his duty. This doctrine is cited with approval in *Hough v. Railway Co.* (100 U. S. 200)." (Italics ours.)

Again, in *The Frank and Willie,* 45 Fed. 494 (*The Osceola,* p. 174), it is said:

"Employers are required to provide workmen with reasonably safe conditions for work, according to the nature of the business, and to the customary provisions for the safety of life and limb."

And further on:

"The same principle has been repeatedly applied in this court in favor of stevedores or their employes on board."

It would serve no useful purpose to review all the cases commented on in the opinion in The Osceola case. A mere reading of them, however, will disclose that in every case the decision of the court is not based upon any implied warranty of seaworthiness in the contract of service, but upon that duty of the master which pervades all the law of master and servant, whether the service performed be upon land or sea, namely, the duty to use "all reasonable means," "all reasonable care and pru-

dence" to furnish to servants safe instrumentalities, using the word "instrumentalities" in its broadest sense.

The remaining authorities cited by libelant are not contradictory of the position which we have taken. The statement in Parsons on Shipping and Admiralty (Vol. 2, p. 78) is that "the owner is bound to provide a seaworthy ship." Obviously, however, this does not mean that there is any warranty of seaworthiness implied in the contract of employment. The books are full of similar statements, such as, "The master is bound to provide a safe place to work;" "is bound to provide safe and suitable instrumentalities." But, as we have pointed out, this is but a short way of saying "The master is bound to exercise due diligence to provide a safe place to work and safe instrumentalities with whch to work."

In *Dixon v. The Cyrus,* 2 Pet. Adm. 407, Fed. Cas. No. 3930, it is said:

> "That law and reason will imply sundry engagements of the captain and the mariners," one of which engagements is "that at the commencement of a voyage the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy."

But is may equally well be said that law and reason have implied sundry engagements of any master to any servant; the most important of such implied engagements being that the master shall

use due care to furnish safe and suitable instrumentalities. A breach of this implied engagement does not give rise to an action on contract; it does give rise to an action for tort, and libelant, therefore, properly characterized her action as "a case of tort, civil and maritime."

(b) Other considerations, however, compel the same conclusion. The libelant was not a party to the contract of September 1, 1907. That contract was the contract of David L. Rainey, a contract purely personal and non-assignable. Assuming, for the sake of argument, that if Rainey had lived he could have brought an action *ex contractu* to recover damages for the pain, suffering or other loss sustained by him, yet this is clearly not such an action. Rainey's action for pain, suffering, etc. died when he died. "It is settled law that actions arising out of contract, express or implied, will not survive where the damages sustained by such breach are for *injuries to the person,* as mental anguish, pain of body, or injury to character" (*Feary v. Hamilton,* 140 Ind. 45, 39 N. E. 516, and cases cited therein), for "whether an action survives, depends upon the *substance* of the cause of action, not on the forms of proceeding to enforce it."

Schreiber v. Sharpless, 110 U. S. 76, 80.
Martin's Admr. v. B. & O. Ry. Co., 151 U. S. 673, 692.

This action, however, is not brought to recover damages sustained by Rainey; it is brought to secure the pecuniary damages sustained by Mrs.

Rainey by reason of Rainey's death. Now a cause of action for the recovery of damages for pecuniary injury resulting from death is purely a statutory one. It is not founded upon the violation of any natural right known to the common or maritime law.

Insurance Co. v. Brame, 95 U. S. 754.
The Harrisburg, 119 U. S. 199.

It is a totally new cause of action, "new in its species, new in its quality, new in its principle, in every way new," one which is wholly distinct from and not a revivor of the cause of action which, if he had survived, the decedent would have for his bodily injury.

The Vera Cruz, 10 App. Cas. 59.
Mich. Central R. R. Co. v. Vreeland, 227 U. S, 59, 69.
Martin's Admr. v. B. & O. Ry. Co., 151 U. S. 673, 696.
Whitford v. Panama R. R. Co., 23 N. Y. 465.
Wooden v. Western N. Y. & P. R. Co., 26 N. E. 1050.
Munro v. Pacific Coast etc. Co., 84 Cal. 515.
Davis v. New York & N. E. R. Co., 3 N. E. 815.

Actions of this kind, however, have always been held to be tort actions, not contract actions.

> "The objection that the case is not a *marine* tort, but only a statutory one, is of the same nature as the objection last considered. Before the statute, the case was *damnum absque injuria;* by the statute, it became at once a tort in the full legal sense, and a *marine tort* by

reason of its place, its nature, and its circumstances, within the definition given by Mr. Justice Blatchford in Leathers v. Blessing, 105 U. S. 626, 630, and as stated also in previous decisions." (Italics, the Court's.)

The City of Norwalk, 55 Fed. 98, 110.

In *Crowley v. Panama R. R. Co.,* 30 Barbour, 99, 109, the Supreme Court of New York said:

"Here was an express agreement made in this state safely to transport the plaintiff's intestate over the defendants' rail road as a passenger, which, if Crowley, from the negligence of the defendants' agents, or servants, had sustained any injury on the said rail road, that he had survived, would unquestionably have entitled him to maintain his action therefor, in this state. If the cause of action set out in this complaint, therefore, could be considered as arising upon this contract, and surviving by force of the statute, in behalf of the plaintiff as the representative of the deceased, then most certainly the action could be maintained in this state. But such is not this action. It is not upon the contract. It is founded upon a *tort.* No right of action for injuries to the person of Crowley can survive; for *'actio personalis moritur cum persona.'* The cause of action under the acts of 1847 and 1849 is a *new* and *original* one, *given by and depending wholly upon the statute."* (Italics, the Court's)

In Hegerich v. Keddie, 1 N. E. 787, the Court of Appeals of New York, speaking by Ruger, C. J., said:

> "If, therefore, we consider this cause of action as a property right, it is as such a right based upon a *tort,* and, except as otherwise provided by the statute creating it, must be governed by the existing rules of law applicable to such causes of action."

To cite additional authority would be useless.

III.

Furthermore, what has the law of Washington to do with this case?

The shipping articles were in the form prescribed by the laws of Great Britain; they were signed before the British Vice Consul at Seattle; the Cacique was owned by a corporation of Great Britain registered under British laws and flew the British flag.

> "Ships," said Judge Hanford, in his opinion in this case, "wherever they may be are deemed part of the country to which they belong and the persons on board are amenable to the laws of that country."
>
> "Whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the law of the country to which the ship belongs. In re *Ross,* 140 U. S. 453, 11 Sup. Ct. 897; *Wilson v. The John Ritson,* 35 Fed. Rep. 663."

The Belvidere, 90 Fed. 106, 109.

The Magna Charta, 2 Lowell, 136.
The Egyptian Monarch, 36 Fed. 773.
The Lamington, 87 Fed. 752.
London Assurance v. Companhia de Moagens, 167 U. S. 149.

The exceptions to the libels were properly sustained.

Respectfully submitted,

HUGHES, MCMICKEN, DOVELL & RAMSEY,
OTTO B. RUPP,
Proctors for Appellee.